No. 13669

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

W. W. SHEPHERD and NORMA D. SHEPHERD, Co-partners, Doing Business as Shepherd Tractor & Equipment Co.,

Appellants,

vs.

CONSTRUCTORA, S. A., a Corporation,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANTS' OPENING BRIEF.

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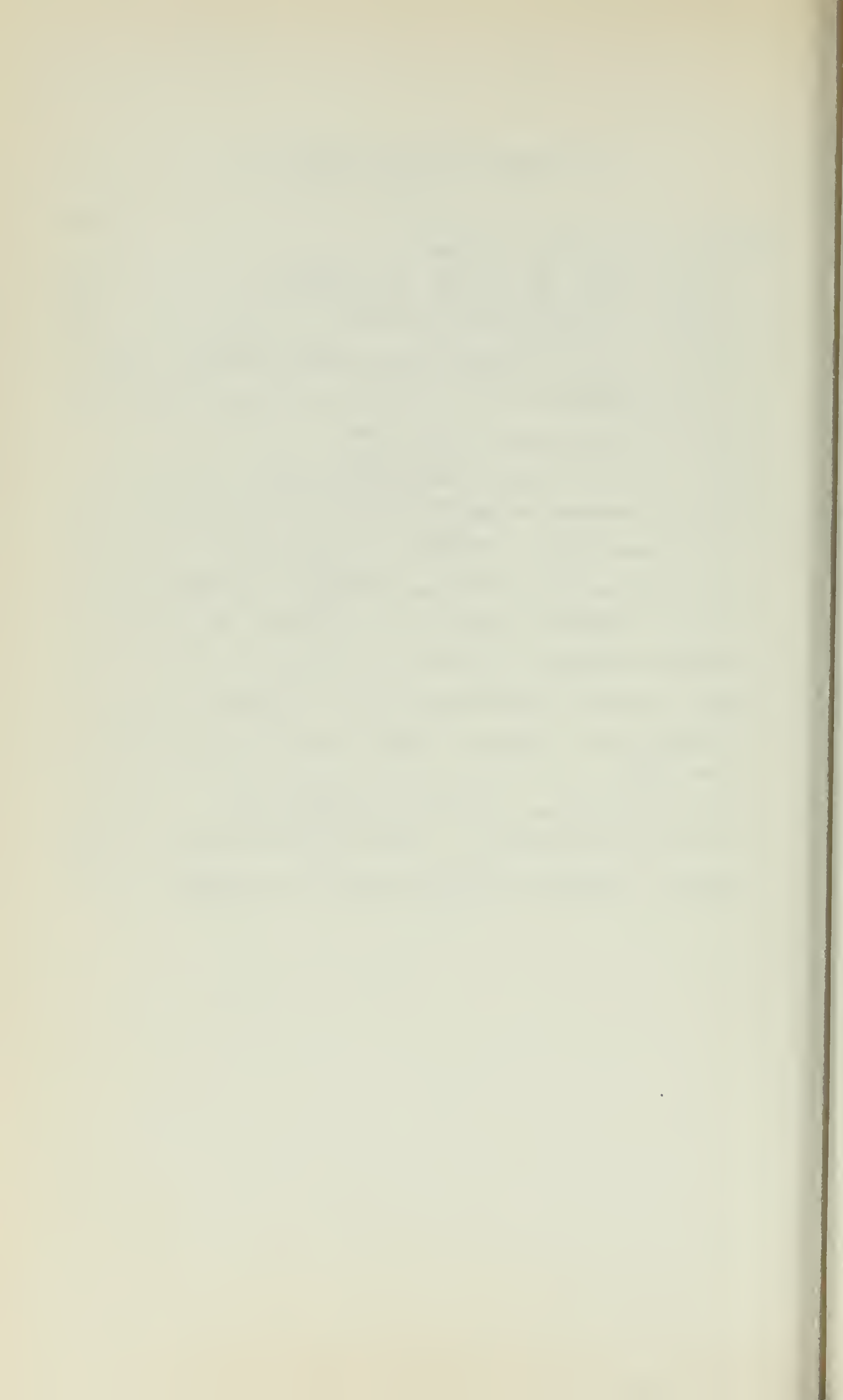

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Constructora, S. A., a Corporation,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANTS' OPENING BRIEF.

Statement of the Pleadings and Facts Relating to Jurisdiction.

Appellee is a citizen of the Republic of Mexico and appellants are residents of the County of Los Angeles, State of California. The amount in controversy exceeds $3,000.00. [Tr. pp. 3 and 4.] The trial court had jurisdiction. (Title 28 U. S. C., Sec. 1332.) The appeal is from a final decision [Tr. p. 33], hence this court has jurisdiction. (Title 28 U. S. C., Sec. 1291.)

Statement of the Case.

An action was brought in the Superior Court of the State of California in and for the County of Los Angeles by appellants against Julio A. Villasenor to recover a

money judgment. [Tr. p. 17.] That in said action and on February 25, 1949, appellant instructed the sheriff of Los Angeles County, pursuant to a Writ of Attachment issued therein, to garnishee personal property in the possession of and under the control of Belyea Truck Company belonging to said defendant Villasenor, and to require a statement in writing from said garnishee. [Tr. pp. 13, 17.] On August 4, 1949, an answer was furnished by the garnishee to the sheriff that it had in its possession a motor grader belonging to the defendants. [Tr. p. 64.] The sheriff did not at any time obtain physical possession of the motor grader, nor did he place a keeper in charge thereof. [Tr. pp. 47-48.]

Prior to February 26, 1949, defendant Villasenor had caused the motor grader to be deposited with Shaw Sales & Service Co. of Los Angeles, California, where the same remained until February 24, 1949, when it was moved to and remained at the yard of Belyea Truck Company until the service of the notice of garnishment mentioned. [Tr. pp. 12, 13.] On May 9, 1949, appellee filed an instrument denominated "Third Party Claim" with the sheriff of Los Angeles County. [Tr. pp. 17, 42-44.] On May 10, 1949, said sheriff demanded of appellant an undertaking on said alleged third party claim. [Tr. pp. 17, 42.] On May 10, 1949, appellants expressly declined to furnish the undertaking demanded of them by the sheriff. [Tr. p. 18.]

On May 10, 1949, appellants filed with said State court a petition to determine the title of said motor grader and for an order restraining the transfer or removal thereof pending said determination. [Tr. pp. 18, 38-39.] The hearing on said petition was set by the court for May 23, 1949, and pending its determination the court enjoined

appellee as requested, no bond being required therefor. [Tr. pp. 18, 40-41.] On June 3, 1949, the petition of the appellant was heard by the State court and on August 17, 1949, it was adjudged that appellee was the owner and entitled to the possession of the motor grader and the sheriff was ordered to release the same to it. [Tr. pp. 18, 45-46.]

The net rental value of the motor grader is $381.40 per month; $148.00 per week on the basis of two weeks or less; $30.20 per day not exceeding five days. [Tr. p. 48.] Appellee's expense in pursuing the motor grader was $225.00. [Tr. p. 19.] A reasonable attorney's fee for appellee would not exceed $500.00. [Tr. p. 51.]

Specification of Errors.

1. The adjudication by the State court of appellee's right of possession to and ownership of motor grader was void for lack of jurisdiction.

2. The trial court erred in denying appellant's motion for a judgment of nonsuit.

3. Damages awarded were erroneously allowed and were also excessive.

(a) Measure of damages for wrongful garnishment is limited to expense of recovering motor grader.

(b) Damages for loss of use of a chattel are not recoverable unless evidence establishes that chattel would have been in use during period of deprivation.

(c) Appellee's failure to mitigate its damage prevents recovery thereof.

4. Damages for loss of use may not be awarded for a period during which injunction was in effect.

ARGUMENT.

I.

The Adjudication by the State Court of Appellee's Right of Possession to and Ownership of Motor Grader Was Void for Lack of Jurisdiction.

The court erred in receiving in evidence Appellant's Exhibit 1, which includes the Judgment *re* Third Party Claim. [Tr. pp. 37-47.] Appellee objected to the offer on the ground that it was apparent on the face of the pleadings in the State court action that the court had no jurisdiction. [Tr. pp. 36-37.]

The trial court erred in making the conclusion of law (IV) that the State court had jurisdiction to determine that appellee had title to and possession of the motor grader. [Tr. p. 31.] It is undisputed that the sheriff's identity with the attachment was restricted to the service of the notice of garnishment. A keeper was not placed in charge of the motor grader by the sheriff, nor did he take it into his possession. [Tr. pp. 47-48.]

The provisions of the California Statute relating to third party claims are found in Section 689 of the Code of Civil Procedure. In referring to this section in the case of *Bank of America v. Riggs,* 39 Cal. App. 2d 679, 104 P. 2d 125, the court said at page 683:

> "The history of said section is there elaborately reviewed and painstakingly treated. From such review, it is developed that the main purpose of the original section as contained in the Practice Act was to give protection to the officer who makes the levy against claims for damages by third parties. Clearly,

no damage can be shown as against the sheriff unless it be in those cases where he seizes and detains physical custody of movables held by him under levy.

* * * * * * * *

"The right of a third party claimant to try the title to an indebtedness due by a garnishee to such third party claimant received the studied consideration of the appellate department of the superior court in the case of Sunset Realty Co. v. Dadmun, 34 Cal. App. (2d) (Supp.) 733 (88 Pac. (2d) 947). Said opinion reviews the several code sections and the cases explanatory thereof. From a thorough review of the authorities, it is there made clear that when a debt is garnished, the right to collect it is vested thereafter solely in the judgment creditor (Sec. 544, Code Civ. Proc.), and when collected it is credited directly on the judgment. Inasmuch as the sheriff did not gain possession of the moneys owing, they remained in the same custody where they rested prior to the levies. To remove them an entirely new action was requisite."

In the case of *First National Bank v. Kinslow,* 8 Cal. 2d 339, 65 P. 2d 796, the court said at page 344:

> "It is only when the officer levies upon personal property that the right to the possession arises. In most instances, when personal property capable of manual delivery is levied upon under execution, it is the duty of the officer to take physical possession of the property levied upon. It is then that a third person claiming said property must assert his claim, and unless he does so, according to a subsequent provision of said section, the officer is not liable to him in damages. Only when personal property is levied upon, can the serving of a third party claim have any force or effect, or result in any advantage to the person serving the same."

It is submitted that the foregoing authorities justify the conclusion that a valid third party claim under the California Statute cannot be filed unless the levying officer has taken possession of the chattel involved.

Notwithstanding the fact that the judgment in the third party claim proceeding appears valid on its face, its invalidity may be established by facts admitted by, or if no objection is made to the admissibility thereof, the party in whose favor the judgment was rendered.

> "However, to the rule just stated there is a well established exception which provides that although the judgment or order is valid on its face, if the party in favor of whom the judgment or order runs admits facts showing its invalidity, or, without objection on his part, evidence is admitted which clearly shows the existence of such facts, then it is the duty of the court to declare the judgment or order void."
>
> *Thompson v. Cook,* 20 Cal. 2d 564, 569, 127 P. 2d 909.

The foregoing authority justifies the conclusion that the third party claim judgment is void by reason of the fact that the motor grader was never in possession of the sheriff as admitted by appellee.

Inasmuch as appellee offered no evidence of its ownership of title and right of possession other than the judgment of the State court, there is no evidence justifying a finding or the conclusion of law mentioned that at the time of the service of the garnishment appellee was the owner and entitled to possession of the motor grader.

II.

The Trial Court Erred in Denying Appellant's Motion for a Judgment of Nonsuit.

At the close of appellee's case, appellant made a motion for a judgment of nonsuit which was denied. [Tr. p. 60.]

The motion for nonsuit should have been granted by reason of the failure of appellee to offer evidence other than the judgment in the third party claim proceeding, of its title and right to possession of the motor grader. [Tr. p. 52.]

It will be observed from the complaint herein that appellee predicated its claim of title and right of possession to the motor grader on the judgment in the third party claim proceeding. [Tr. p. 5.] There is no unqualified allegation in the complaint that at the time the garnishment was served appellee was the owner of and entitled to the possession of said motor grader. Nor was there any attempt on the part of appellee to introduce evidence to such effect other than the judgment mentioned.(7)

III.

Damages Awarded Were Erroneously Allowed and Were Also Excessive.

The judgment rendered herein for $2,898.70 was computed as follows:

$ 225.00	expenses incurred in purchasing chattel
500.00	attorney's fees of appellee herein
1,058.80	two months, fourteen days loss of use during garnishment period
1,114.90	three months, six days loss of use during injunction period
$2,898.70	Total

(a) Measure of Damages for Wrongful Garnishment Is Limited to Expense of Recovering Motor Grader.

In the absence of fraud, malice or oppression, damages sought for wrongful levy of process where the property wrongfully taken has been recovered, is limited to the expense of procuring its return with interest, its successful recovery being considered as having been received in mitigation of damages.(1)

The rule that damages accruing as a result of property wrongfully taken by process are limited to the expense of procuring the return of the property has been in effect since the year 1900.(2)

(b) Damages for Loss of Use of a Chattel Are Not Recoverable Unless Evidence Establishes That Chattel Would Have Been in Use During Period of Deprivation.

By its amended complaint appellee alleged that it was deprived of the use of the motor grader during the period following the garnishment. It was further alleged that appellee unsuccessfully sought to rent another similar motor grader. Appellee sought to recover as damages the reasonable rental cost of a similar motor grader in Los Angeles County during said period. [Tr. p. 15.] The reasonable rental value was stipulated, without prejudice. [Tr. p. 48.] There was no evidence that appellee, a Mexican corporation, lost an opportunity of putting the motor grader to any specific use in the County of Los Angeles during the period in question, assuming that it had possession thereof.

It was incumbent upon appellee to establish by the evidence the number of days during the period in question

that the motor grader could have been put to use in Los Angeles County, excluding from such computation such days on which the motor grader would not be operated because of holidays, etc., and days for which there was no work available to appellee for such type of equipment.(3)

(c) Appellee's Failure to Mitigate Its Damage Prevents Recovery Thereof.

If one knows that he is threatened with damage because of another's tort, it is his duty to do all that he reasonably can to minimize his damage, and if he fails to do so because of negligence or willfulness, the unnecessarily resulting enhanced damages cannot be recovered.(4)

The motor grader was garnished in the hands of Belyea Truck Co. on February 25, 1949. A period of two months and fourteen days was permitted to elapse by appellee until May 10, 1949, before it made known its claim of a paramount title and right to possession through the medium of a third party claim. Without permitting a day to elapse, appellants gave notice of its unwillingness to continue the garnishment in effect by refusing to furnish the sheriff with an undertaking. An injunction against the removal of the motor grader was obtained and notice thereof given to appellee's attorneys on May 10, 1949. Thereafter, appellee took no steps to modify the injunction or to require appellant to deposit an undertaking as a condition for the continuance of the injunction.

Appellee undertook to make no showing justifying the tardiness of its third party claim because of lack of notice,

etc. It was stipulated that appellee was financially sound, able to employ attorneys, procure bonds, or expend monies that may have been indicated or desirable for the recovery of the motor grader. [Tr. p. 61.]

Specifically it was the duty of appellee to mitigate its damages by availing itself of its statutory right to procure immediate possession of the property. This could have been accomplished by invoking any of the statutory provisions for the recovery of personal property such as replevin, claim and delivery, or proceedings under Section 689, Code of Civil Procedure, if the same are held applicable to this case. If it was necessary to give bond in said proceedings, it was appellee's duty to do so.(5)

IV.

Damages for Loss of Use May Not Be Awarded for a Period During Which Injunction Was in Effect.

On May 10, 1949, and as part of its order providing for the hearing of appellant's petition for determination of title, it was ordered that pending such determination that appellee be enjoined from transferring or removing the motor grader. The order did not require appellant to provide an undertaking on said injunction. [Tr. pp. 40-41.]

Appellee made no complaint of the court's omission to require of appellant an undertaking on the injunction. Knowing that it was the law, as the authorities hereinafter set forth establish, that in the absence of malice, ill-will and of probable cause, any recovery for an alleged

wrongful issuance of an injunction would be restricted to a suit against the surety under an injunction bond, the appellee should have petitioned the court for an order requiring such bond to be posted.

> "But it cannot be doubted that the court has power, where it appears that the injunction was issued on an insufficient undertaking, to order (as it did in the case in question) that the injunction should be dissolved unless a sufficient undertaking should be given, —or, in other words, should be continued in force only on condition that a sufficient undertaking should be given."
>
> *Lambert v. Haskell,* 80 Cal. 611, 616, 22 Pac. 327.

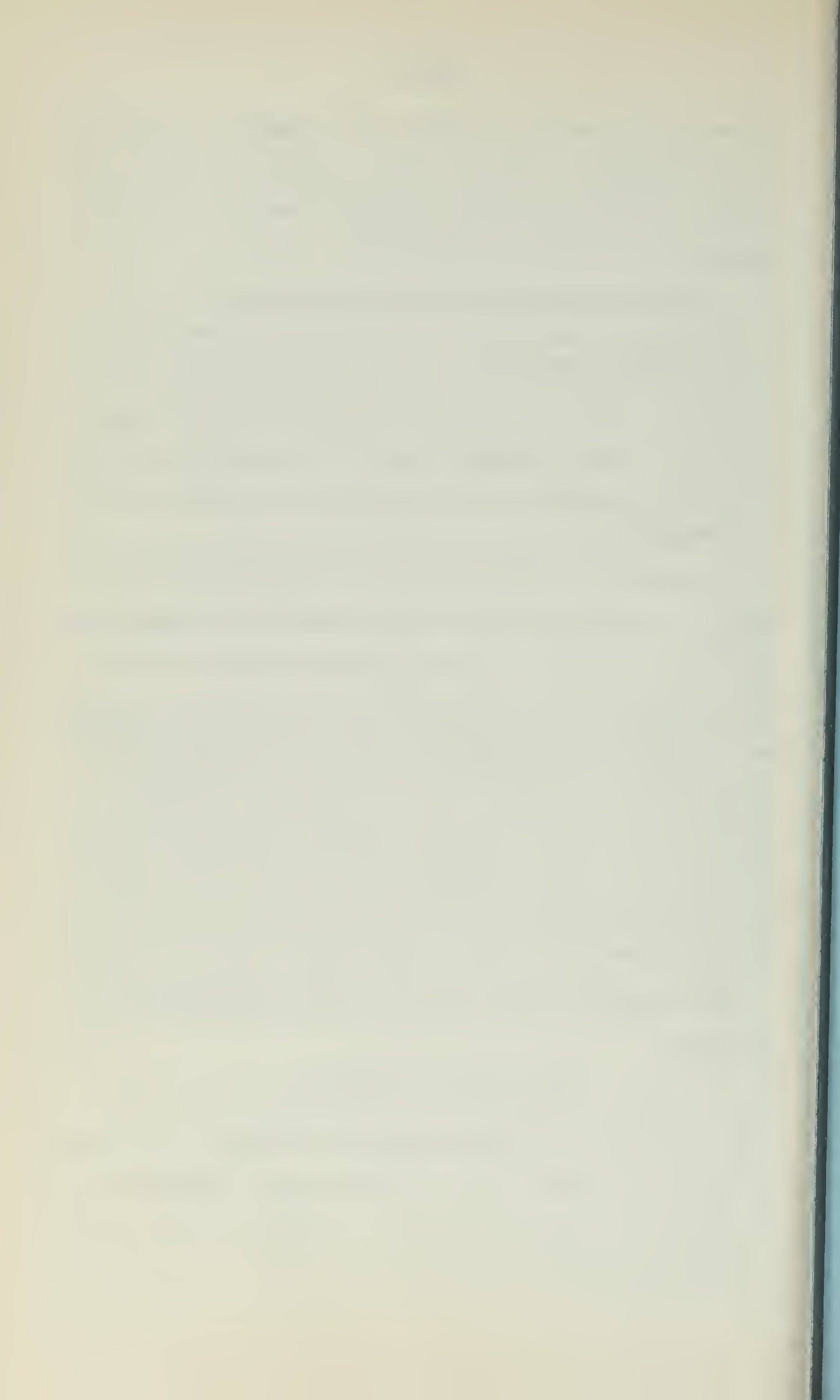
Unless it is charged that the issuance of an injunction represents an abuse of process through malice, and without probable cause, the only remedy of a party injured as a result of an injunction is upon the undertaking for the injunction. In the absence of such an undertaking no recovery may be had against the party procuring the injunction.(6) Accordingly, $1,114.90 of the judgment representing an award for loss of use of the motor grader for the period the injunction was in effect was erroneous.

The appellants respectfully pray that the judgment be reversed.

Respectfully submitted,

William K. Young,

Attorney for Appellants.



APPENDIX.

(1) The appellants' contention is that they should have had substantial compensatory damages and also punitive or exemplary damages. As to the compensatory damages, there was considerable confusion by all parties in the trial of the case as to what the proper measure of damages. It appears from the record in the case that there might have been two items which would have entered into the compensatory damages, that is to say, the deterioration of the cherries while in the possession of the sheriff under the writ and also the loss of the cherries by becoming overripe and dropping on the ground, if such was the fact.

In *Dorsey v. Manlove*, 14 Cal. 553, at 556, it is said:

"Where no question of fraud, malice or oppression, intervenes, the law limits the relief to compensation, as that term is legally understood; and in such cases the measure of relief is purely a matter of law. But where the trespass is committed from wanton or malicious motives, or a reckless disregard of the rights of others, or under circumstances of great hardship or oppression, the rule of compensation is not adhered to, and the measure and amount of damages are matters for the jury alone. In these cases the jury are not confined to the loss or injury sustained, but may go further and award punitive or exemplary damages, as a punishment for the act, or as a warning to others. We think these views are fully sustained by the authorities."

"As to the first item, that is, the depreciation of the value of the cherries, we are not prepared to say that the measure of damages which the court adopted was errone-

ous. The appellants set forth the general rule as follows: "The general rule is that where one recovers property which had been wrongfully taken from him, he is considered as having received it in mitigation of damages, and the measure of damages in the absence of special damage, is the expense of procuring its return with interest. But he may recover for any injury to the property during the period of wrongful detention. The provisions of section 3336 of the Civil Code fixing the measure of damages for the conversion of personal property apply only where the property is not returned or recovered and does not affect the rule here announced." (8 Cal. Jur. 781.)

"As in this case, where the cherries were returned, the damages would undoubtedly be the injury or loss suffered during the time between the levy and return, and the difference in the market value on those dates might be as proper a way to arrive at it as any other method, where there were no other special circumstances pleaded." "

> *Ross v. Sweeters,* 119 Cal. App. 716, 721, 722, 7 P. 2d 334.

(2) "The rule is that 'where one recovers his property again which had been unlawfully taken from him, he is considered as having received it in mitigation of damages'; and the measure of damages, in the absence of special damage, is the expense of procuring its return (with interest). (1 Sutherland on Damages, 239; and see 3 Sutherland on Damages, 527; and to same effect 1 Sedgwick on Damages, sec. 58.)"

> *Blewett v. Miller,* 131 Cal. 149, 151, 63 Pac. 157.

A similar rule relating to damages arising from wrongful garnishment:

"The contentions of counsel for Child seem to rest upon the theory that the garnishment was in substance an attachment wrongfully depriving him of the enjoyment of his property, the amount due from Sanger Lumber Company, pending the garnishment proceeding, and the controversy between him and lumber exchange as to which was entitled to be awarded the fund in question. This, we think, is a mistaken theory. The garnishment was not issued against Child, nor was any property taken from his possession under it, nor did it in the least interfere with his right to sue Watterman or Sanger Lumber Company for the amount due him. Instead of asserting his right to collect the indebtedness due him by an ordinary civil action, he voluntarily intervened in the garnishment proceeding seeking recovery of this fund in satisfaction of that indebtedness. In other words, he voluntarily became a plaintiff in intervention seeking relief, which, in substance, was the same ultimate relief he would have been seeking had he voluntarily become a plaintiff in an ordinary civil action seeking recovery of the indebtedness due him. We fail to see that Child is in any different position than he would have been in had he commenced and prosecuted to a successful termination such an ordinary civil action, insofar as his right to damages he here seeks is concerned. When the controversy was finally determined in his favor, he was awarded his costs. Plainly, he is not entitled to more for his trouble

incident to the prosecution of his claim, viewing his rights apart from any theory of malicious prosecution or want of probable cause on the part of lumber exchange in prosecuting the garnishment proceeding."

Child v. Western Lumber Exch., 233 Pac. 324 (Wash.).

(3) "Compensation is the cardinal purpose of the law of damages. Rockefeller v. Merritt, 76 Fed. 909, 917, 22 C. C. A. 608, 35 L. R. A. 633. With the exception of those rare cases in which punitive damages may be recovered, says Judge Sanborn, speaking for the Circuit Court of Appeals, Eighth Circuit, a defendant is never liable to pay more than the actual loss which he has inflicted upon the plaintiff by his wrong. Hoyt v. Fuller, 104 Fed. 192, 193, 43 C. C. A. 466. To give him damages where none have been caused is not to compensate him for a loss, but to punish the wrongdoer, and this is not permissible, except in the cases just mentioned.

"We think the better rule is followed in Frey v. Drahos, 7 Neb. 194, and Smith v. Stevens, 14 Colo. App. 491, 60 Pac. 580, where it was held in substance that plaintiff could not recover merely because he had a right to use, or was in a position to use, the property taken from him, but that it was incumbent upon him to go further, and show he needed the car, and was prevented from using it by the wrongful detention of it by the defendant. This is in harmony with the decision of the Supreme Court of the United States in The Conqueror, 166 U. S. 110, 133, 17 Sup. Ct. 510, 41 L. Ed. 937. * * *

"We gave expression to the same principle in Railroad Co. v. Car Co., 5 App. D. C. 524. In that case the plaintiff had entered into a contract with the defendant

to manufacture for it a number of street cars and deliver them within a certain time. It failed to make the delivery as prescribed. The defendant, when sued for a balance claimed to be due on the contract, contended it was entitled to recover by way of recoupment for loss of profits during the delay in the delivery. The court put aside the contention as unsound, and held that it was entitled to the reasonable hire or rent of the cars for the period of delay, provided they 'could and would have been in actual service' during that time.

"Following the rule laid down by these authorities, if there were days when the plaintiff did not have use for his car, they should be deducted from the whole period for which he is entitled to recover damages."

> *W. B. Moses & Sons v. Lockwood,* 295 Fed. Rep. 936, 940, 941.

(4) "It is a recognized rule of law that in a case where injury or damage to a plaintiff's property is threatened as the result of a tort or breach of contract by another, the duty rests upon the plaintiff to use reasonable care and diligence to protect his property against such threatened loss or injury, and if he fails to do so he will not be permitted to charge the defendant for that portion of his loss or injury which was due to plaintiff's own neglect in this behalf. This rule has been repeatedly recognized and applied in this state as well as elsewhere."

> *Vitagraph, Inc. v. Liberty Theatres Co.,* 197 Cal. 694, 697, 242 Pac. 709.

"The rule is well stated in 8 California Jurisprudence, 782, as follows: 'It is the duty of one who knows he is threatened with detriment, either in person, property or business, through another's breach of contract or tort,

to do all that he reasonably can to prevent or minimize the damage, and if he negligently fails to do this, he cannot recover for what he might have prevented.' "

> *Pretzer v. California Transit Co.,* 211 Cal. 202, 208, 209, 294 Pac. 382.

"It was the duty of the respondent to minimize his damage in every way. In *Baker v. Borello,* 136 Cal. 160 (68 Pac. 591), the court said: 'A party injured by the tort of another must not, by his negligence or wilfulness, allow the damage to be unnecessarily enhanced; and if he does so he cannot recover for the increased loss.' "

> *Withrow v. Becker,* 6 Cal. App. (2d) 723, 730, 45 P. 2d 235.

"The rule is well settled that it is the duty of one who know he is threatened with damage to do all he reasonably can do to minimize his damage."

> *California Cotton etc. Assn. v. Byrne,* 58 Cal. App. 2d 340, 345, 136 P. 2d 359.

(5) "(9, 10) Another principle which is applicable in this case: Where a person's right of property is invaded, it is his duty to do all reasonably within his power to reduce the damages. Damages which may be avoided by doing what an ordinarily prudent man would do are not the direct or natural consequence of the defendant's wrong, since it is plaintiff's option to suffer them. In such a situation the plaintiff is damaged, not by the defendant's act, but his own negligence or indifference to consequences. Chesapeake & Ohio Railway Co. v. Kelly, 241 U. S. 485, 489, 36 Sup. Ct. 630, 60 L. Ed. 1117, L. R. A. 1917F, 367, and cases there cited. The same effect are Sedgwick on Damages (9th Ed.), vol. 1, Secs. 201

and 202; Hoyt v. Fuller, *supra;* Woodward v. Pierce Co., 147 Ill. App. 339.

"(11) When the plaintiff's car was taken from him, he could have procured its return immediately by giving an undertaking under section 455 of the Code, with security approved by the court. It was his duty to do this, and thus to reduce the defendant's liability. If he had done it, the only loss which would have come to him would be that occasioned by the expense of procuring the undertaking and necessarily incurred for a car between the date of the levy and the return of his own car, assuming that he used due diligence throughout."

W. B. Moses & Sons v. Lockwood, 295 Fed. Rep. 936, 941.

"In determining the question of damages, the trier of the facts should consider the particular circumstances of the case, and, upon the facts, determining whether or not, at any stage of the proceedings, the Plaintiff should have mitigated his damages by availing himself of his statutory right to procure immediate possession of the property. In this connection, all relevant and material facts should be considered, including the expense connected with such a procedure, the financial ability of the Plaintiff to bear such expense, the relationship between such costs and the amount of damages claimed by the Plaintiff, the matter of whether or not any bond filed by Plaintiff would be met by a counter bond filed by the defendant, and an estimate of the probable time within which a judgment in the action, determining the title of the property, would be entered."

Hoff v. Lester, 168 P. 2d 409 (Wash.).

See:

Bradley v. Raymond, 209 P. 2d 305, 310.

(6) "An action on the case will not lie for improperly suing out an injunction, unless it is charged in the declaration as an abuse of the process of the Court through malice, and without probable cause. If the act complained of is destitute of these ingredients, then the only remedy of the injured party is an action upon the injunction bond, which is specially provided by the statute as a protection against injury, even without malice."

Robinson v. Kellum, 6 Cal. 399, 400.

"This is not an action brought upon an undertaking given upon the appointment of a receiver, required by section 566 of the Code of Civil Procedure, to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of the receiver, in case the appointment has been procured wrongfully, maliciously or without sufficient cause. In bringing the action and procuring the appointment of a receiver, defendant Richardson was acting in his official capacity in the exercise of powers conferred upon him as Commissioner by the Building and Loan Association Act (Deering's Gen. Laws, 1931, P. 459, secs. 13.11 *et seq.*). No undertaking was given under section 566 nor was one required of the Commissioner, a state officer. (Sec. 1058, Code Civ. Proc.; *Mercantile Trust Co. v. Miller,* 166 Cal. 563 (137 Pac. 913).)

"(2) The liability of those who give the statutory indemnity bond, as principal or sureties, is created by contract and the action for damages is upon the contract. Here there was no undertaking and if any liability exists, its foundation is in tort as for malicious prosecution."

Jones v. Richardson, 9 Cal. App. 2d 657, 659, 660, 50 P. 2d 810.

(7) "And as the case stands the third party claimant is unaided by any such presumption; and the burden is where it was placed primarily by the pleadings upon the third party claimant, the plaintiff, to establish his title and right of possession by a fair preponderance of all the evidence thereon.

"In view of an apparent conflict of the authorities on this question, we will state that, from an examination of what we believe to be nearly all the authority available on this question, the conflict apparently arises, in the first instance, because of the difference in procedure, causing the third party to be regarded accordingly at times as an intervener, and as such an additional party defendant, as to whom the plaintiff, the attaching creditor, still has the burden of proof, because of being plaintiff in the action. And then, again, under statutes requiring separate actions therefor to be brought after service of notice of third party claim, in which instances, the burden of proof, as in other cases, being upon the plaintiff under the pleadings, he (the third party) has to assume it throughout the trial. But in nearly all of the states, even where the third party intervenes in the original attachment action, such third party has such burden of proof, except where the property is found by the sheriff in the undisputed possession of the third party, the intervener; whereupon a presumption of ownership is in some jurisdictions held to arise from the fact of such possession.

"The court rightfully refused to give the instructions requested, and placed the burden of proof where it belonged. (Citations omitted.) 3 Elliott on Evidence, Nos. 1751, 1752, from which we quote: 'Where a third party interpleads or brings an independent action, claiming a superior right to the attached property, the burden in

most jurisdictions is upon such party to show his better claim.' And then again: 'Where a petition of intervention to an attachment is filed, and the petition is based upon the fact that the property belongs to the one intervening, and claims that the intervener acquired it by purchase prior to date of attachment, the burden is upon such intervener to show that he owned it before the filing of the attachment, and to prove by what manner he acquired title to it, or any other interest he may claim. * * * The burden of proof is usually upon the intervening claimant to prove that the property belongs to him, if in the hands of the attachment defendant; and this is true, even though the property is not actually in his possession, but only constructively so, or if in the hands of his agents, or of a carrier. The plaintiff has the burden of showing that at the time of seizure the sale was completed, and title had passed.' 47 Cen. Dig. col. 216, under title 'Burden of Proof.' "

Wipperman Mercantile Co. v. Robbins, 135 N. W. Rep. 785, 792.